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16 UNITED STATES DISTRICT COURT
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18 NORTHERN DISTRICT OF CALIFORNIA
19
20 SAN FRANCISCO DIVISION

20	STATE OF CALIFORNIA <i>ex rel.</i> JAYDEEN)	Case No. 07-cv-04911-CRB
	VICENTE and JAYDEEN VICENTE)	Assigned to: Hon. Charles R. Breyer
21	Individually,)	
)	DEFENDANT ELI LILLY AND
22	Relator,)	COMPANY'S REPLY IN SUPPORT OF <i>EX</i>
)	<i>PARTE</i> MOTION TO PLACE
23	v.)	DOCUMENTS UNDER SEAL (L.R. 7-10;
)	STANDING ORDER, PARAGRAPH 3)
24)	
25	ELI LILLY AND COMPANY,)	
)	
26	Defendant.)	
)	
27)	

1 Defendant Eli Lilly and Company's ("Lilly") Motion to Place Documents Under Seal
2 satisfies the requirements of Civil Local Rule 79-5.

3 **First, this Court has the authority to seal the records as requested.** Confidential
4 Lilly documents essentially the same as those attached to Relator's Complaint in this action, are
5 already subject to a protective order ("CMO-3") in the parallel multidistrict litigation, *In Re Zyprexa*
6 *Products Liability Litigation*, MDL No. 1596 ("MDL"). Though there is a presumption of public
7 access to court records based on First Amendment grounds, *Nixon v. Warner Communications, Inc.*,
8 435 U.S. 589, 597 (1978), the court also has inherent supervisory powers over its own records and
9 files, which may be exercised to deny public access to court records where – as here – court-filed
10 documents may be used for "improper purposes." *Id.* at 598. In such circumstances, the court
11 weighs the presumption of public access against "whether disclosure of the material could result in
12 improper use of the material for scandalous or libelous purposes or infringement upon trade secrets,"
13 *Hagestad v. Tragesser*, 49 F. 3d 1430, 1434 (9th Cir. 1995) (internal citations omitted), including
14 where court records would serve as "sources of business information that might harm a litigant's
15 competitive standing[.]" *Nixon*, 435 U.S. at 598. Local rules govern the form and content for
16 sealing requests in such circumstances. *See* Civ. L.R. 79-5.

17 **Second, the identified documents warrant sealing.** "A sealing order may issue
18 only upon a request that establishes that the document, or portions thereof, is privileged or
19 protectable as a trade secret or otherwise entitled to protection under the law." Civ. L.R. 79-5. The
20 documents at issue here are so entitled, *Nixon*, 435 U.S. at 598; *Hagestad*, 49 F. 3d at 1434, as
21 evidenced by, among other things, both the judicial findings in the MDL proceedings and the
22 employee confidentiality agreement.

23 The parallel MDL proceedings and CMO-3 protective order issued therein are not
24 relevant because the protective order has somehow been breached here, but because that order and
25 its ensuing enforcement reflect a judicial determination that these Lilly documents, and other Lilly
26 documents like them, merit protection. As the MDL Court held after examining the leaked
27 documents there:

1 The court has examined a sampling of the documents distributed by the
 2 conspirators. It has viewed portions of the materials returned to the Special
 3 Master for Discovery, Peter Woodin, pursuant to his and the court's orders.
 4 Among them are a substantial number whose publication would be annoying,
 5 embarrassing, oppressive, and burdensome to Lilly; they reveal trade secrets,
 6 confidential preliminary research, development ideas, commercial information,
 product planning, and employee training techniques. . . . These documents are
 covered by [the protective order] CMO-3. They are included within the kind of
 documents protectable under Rule 26 (c) of the Federal Rules of Civil Procedure.¹

7 *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 404 (E.D.N.Y. 2007). The documents attached to the
 8 Complaint are essentially the same as those covered by the protective order in the MDL, Rogoff
 9 Dec. ¶ 7. Accordingly, these documents warrant the same protection here.

10 Relator makes much of the fact that these documents were not obtained through
 11 discovery and therefore asserts that the documents are not entitled to protection. This assertion
 12 ignores the Employee Confidentiality Agreement signed by Relator. This Confidentiality
 13 Agreement demonstrates Relator's own acknowledgement of the confidential nature of these
 14 documents and that Relator violated her contractual obligation to return these documents upon the
 15 conclusion of her employment. Relator's discussion of First Amendment protections for
 16 dissemination is therefore immaterial. The documents attached to the Complaint were kept and
 17 published by Relator in violation of her contract. There is no First Amendment right to breach a
 18 contract, and Relator points to none.²

19 **Third, the motion is narrowly tailored.** The motion here is narrowly tailored to
 20 allow public access to Relator's Complaint and all of Relator's allegations. It seeks only to protect
 21 the competitively sensitive information contained within the exhibits essentially the same as
 22 documents that the MDL court in related litigation already has deemed confidential, and has seen fit

23 ¹ The Court noted that some of the disseminated documents were in the process of being declassified. *Id.*

24 ² The only public dissemination of these documents of which Lilly is aware is the one that took place in express violation
 25 of the MDL protective order. *In re Zyprexa Injunction*, 474 F. Supp. 2d 385. The subsequent intentional placing of
 26 confidential documents on the Internet in a blatant and intentional effort to thwart that Court's ability to enforce its own
 27 Orders, relying on which Lilly had agreed to provide the documents, *id.*, is the only reason certain documents were
 28 publicly exposed. This is not a situation where Lilly previously waived by public disclosure what it now seeks to
 protect. To deny Lilly the protection it here seeks – on the basis of “public disclosure” – would reward such cynical
 behavior and compound the exposure of Lilly in its efforts to protect its indisputably confidential information, and would
 be inconsistent with the objectives of the MDL protective order entered by the MDL court. It would plainly be
 inequitable.

1 to afford protections to such documents. Relator's allegations against Lilly remain public; only
2 Lilly's confidential business information is protected, consistent with the millions of pages of Lilly
3 documents produced in the MDL.

4 Accordingly, and for the reasons already before this Court, Lilly's request should be
5 granted.

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7 Dated: October 17, 2007

SIDLEY AUSTIN LLP

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9 By: /s/Timothy T. Scott
10 Timothy T. Scott

11 Attorneys For Defendant
12 ELI LILLY AND COMPANY
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